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IN THE

Supreme Court of the United States

October Term, 1968

No. 1022

WILLIAM PRONER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRIS B. STEINBERG
Attorney for Petitioner
25 Broad Street
New York, New York 10004

HARRIS B. STEINBERG
STANLEY S. ARKIN
Of Counsel

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IN THE

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No. .....

WILLIAM PRONER,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

William Proner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in a case entitled *United States* v. *William Proner* on January 10, 1969.

Citations to Opinions Below

There was no opinion in the District Court. The opinion of the Court of Appeals is set forth in Appendix A hereto, *infra,* p. 1a, and is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 10, 1969 (Appendix B, *infra*, p. 9a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Whether the "concurrent sentence doctrine" enunciated in *Hirabayashi* v. *United States*, 320 U. S. 81, 105, and subsequent cases and applied by the Court of Appeals in the instant case is an unconstitutional deprivation of due process or constitutes an unsound rule of appellate review which should be corrected by this Court's exercise of its supervisory powers,

(a) because it denies appellate review of possibly invalid convictions which may result in further penalties or disabilities being imposed on petitioner; and

(b) because the possibly invalid convictions on the 6 counts of the indictment which the Court of Appeals did not review may have prejudiced the petitioner in the eyes of the sentencing judge?

2. Whether the Court of Appeals applied an erroneous or unconstitutionally loose standard of what may have influenced the jury's verdict,

(a) when it found that evidence challenged by petitioner was unrelated to the jury's verdict on two counts of an eight count indictment, and

(b) when it held that a confusing charge to the jury could only properly be read as requiring that the jury not consider that same evidence in its deliberation on the two counts?

3. Whether the prosecutor's statements made in his summation, vouching for the credibility of the prosecution's main witness, deprived petitioner of his constitutional right to confrontation and constituted improper conduct on the part of the prosecutor requiring reversal of petitioner's conviction?

Constitutional Provisions and Statutes Involved

The petition raises questions under the Fifth and Sixth Amendments to the Constitution of the United States and 28 U.S.C. §1291.

UNITED STATES CONSTITUTION, AMENDMENT V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CONSTITUTION, AMENDMENT VI:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

TITLE 28, U.S.C., §1291:

> "Final decisions of district courts—The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. * * *"

Statement of the Case

Proceedings

Petitioner, William Proner, was indicted in the United States District Court for the Southern District of New York with Leo Kaplan for wilful evasion of income taxes for 1959 (Count 2); wilful filing of false statements of annual income for the years 1959-1964 (Counts 3-8—these counts were similar, and differed only with respect to the periods of time involved); and conspiring to commit the offenses charged in Counts 2 to 8 and to defraud the United States of payments due under the terms of a compromise agreement which petitioner had made with the Internal Revenue Service in 1957 (Count 1).

Trial was had in the United States District Court for the Southern District of New York before MANSFIELD, D. J., and a jury. It resulted in the conviction of both defendants on all the counts in the indictment. Petitioner was sentenced to three years' imprisonment on each count, the sentences to run concurrently. On January 10, 1969 the Court of Appeals for the Second Circuit affirmed petitioner's conviction.

The Evidence

The government offered evidence to the effect that petitioner had compromised his tax liability for the years 1942 to 1945, by entering into an offer in agreement with the government in 1957. That agreement provided that petitioner was to pay a graduated percentage of his "annual income" for the years 1956 to 1965. "Annual income" was defined to include petitioner's proportionate share of

corporate net income in any closely held corporations in which petitioner had an interest, whether or not distributions were made to him.

One theory advanced by the prosecution was that from 1959 to 1964 petitioner had held an interest in the Palmer Import Trading Company and had failed to report his share of the profits of this company. In computing the profits, the government argued that certain business expense deductions of the company were unsubstantiated, and that therefore the company's profits were even greater than that declared on its corporate tax return.

As an entirely separate and alternative theory of prosecution, the government contended that petitioner failed to report as additional income to him payments received by him from Palmer Import as expense allowances. In this connection the prosecutor made his position clear when he stated that the government "could be trying Mr. Proner right now on a false annual statement as to those expenses without anything else in the case" (Record, pp. 709-10). The government's theory was that as certain of these sums were not fully substantiated by petitioner as reimbursements for business expenses actually incurred, they had to be taken into his individual income, and petitioner's failure to report them as such constituted criminal fraud.

Evidence relating to this latter theory—that petitioner was guilty of fraud because he received monies as reimbursement for unsubstantiated business deductions—constituted a substantial portion of the prosecution's case, and, indeed, the testimony of the two Internal Revenue Agents was principally concerned with it. No evidence was ad-

duced to show that a claimed expense had not in fact been incurred. Rather, the agents testified to the effect that the amounts claimed were insufficiently substantiated, and that they had disallowed portions of them as being unreasonable in amount. An example of the type of evidence relied upon by the prosecution to establish fraud is the following brief excerpt from Agent Hans Seidemann's testimony in which he states that he disallowed certain of the claimed expenses for meals as being unreasonable in amount based on the opinions of acquaintances of his—whose names he could not recall:

> "Q. I believe that you testified that that amount was disallowed after you had examined airline tickets to check arrival and departure, and to make allowance for the number of nights spent away from home, and that you estimated the cost of meals, is that correct? A. That's correct.
>
> Q. Do you recall what trip or trips this covered, Mr. Seidemann? A. This covered various trips. This covered a 19 day trip to Japan. This covered a 24 day trip to Japan. This covered a short trip to Yugoslavia, and it also covered trips within the United States to Boston, Massachusetts, to Houston, Texas.
>
> Q. Mr. Seidemann, would you tell us what estimate you made for meals while in Japan? A. The estimate for meals I arrived at by talking to some individuals who within that period of time give or take two or three years, had traveled to Japan.
>
> Q. Who were they? A. Some individuals, some acquaintances. I don't recall exactly who it was at that time, but I had made some inquiries about the reasonable amount for meals expense in this particular country.
>
> Q. Reasonable in whose opinion, yours or theirs? A. It could not be mine because I had not been there.

Q. It could not be yours? A. It could not be mine, I had not been there.

Q. You applied it is [sic] somebody else's estimate as to what was reasonable? A. I certainly could not use my opinion as to what was reasonable." (Record, pp. 619-20.)

The Prosecutor's Summation

During the course of his summation, the prosecutor in characterizing the testimony of Aaron Schur, one of his principal witnesses, stated:

"Mr. Schur gave his answer and said he told me two weeks ago. I can't take the stand and testify. But I am telling you right now that if I did not believe what he had told me was true, I never would have let it stay the way it was on the record." (Record, p. 780.)

The Charge

In its charge the trial court told the jury:

"* * * In addition the Government contends that certain other items, most of which are much smaller in amount than the alleged proportionate share of Palmer Import Trading Company's profits attributed by it to Proner, either were disallowed or should have been disallowed and taxed as income to Proner * * *

The Government next claims that there were a series of deductions representing payments by Palmer to Proner during the period from 1959 to 1964, which were improperly deducted. As for the years 1959 to 1961, there was testimony on the part of Agent Lieberman that the amounts disallowed had been agreed to by Palmer and had been added to Proner's income with Proner's agreement." (Record, pp. 851-52.)

The Appeal

In the Court of Appeals, petitioner argued that the government's proof on its unsubstantiated deduction theory was insufficient to sustain a criminal conviction because there was no proof that petitioner had not actually expended the money so received for business expenses, but only evidence that the expenses were not fully substantiated.

As such money was proved by the government to have been received by petitioner in every year for which he was charged, and as the Court's instructions could easily be construed as having left it open to the jury to convict petitioner on every count on this theory, petitioner argued that it could not be known whether the jury convicted him on this evidence or solely on the evidence of his interest in Palmer Import Trading Company and his consequent failure to report a share of its profits.

Accordingly, it was contended that his convictions on all counts should be reversed and a new trial granted.

In its opinion, the Court of Appeals recognized that if petitioner's contentions were "* * * correct, the conviction on Counts 2-8 [was] subject to reversal since there [was] no way for [the] Court to know on which evidence the jury based its verdict," and that, "* * * a successful challenge to Counts 2-8 would require reversal of the conspiracy conviction under Count 1 * * *" (Appendix A, p. 4a). However, the Court ruled that it "need not decide the merits of [petitioner's] arguments * * *" (Appendix A, p. 4a).

The Court said, "[b]ecause the conviction on Counts 2 and 3 [is] unrelated to the evidence challenged by Proner and because the sentences on all counts were concurrent, the judgment of conviction must be affirmed regardless of the validity of the conviction on the other counts" (Appendix A, p. 6a).

To sustain its conclusion that the unsubstantiated business expense theory of the prosecution did not affect Counts 2 and 3, the Court analyzed the evidence. In effect, the Court stated that since the Palmer Import Company operated on a fiscal year running from October 1, 1959 through September 30, 1960, it was possible that petitioner had been reimbursed in calendar 1959 for expenses deducted by the company in fiscal 1960. But the Court found that there was no evidence as to whether some of the payments to petitioner disallowed to the Palmer Import Company during its fiscal 1960 year actually took place during calendar year 1959.* Moreover, the Court said any reimbursements to petitioner in the last quarter of 1959 (fiscal 1960) were introduced only with respect to petitioner's 1960 return, even though he was on a calendar tax year.

In its instructions, the trial court told the jury "* * * The Government next claims that there were a series of deductions representing payments by Palmer to Proner during the period from 1959 to 1964, which were improperly deducted * * *" (Record, p. 852). The Court of Appeals disposed of petitioner's argument that such instructions may have left it open to the jury to convict him on the 1959

* In this finding the Court of Appeals was plainly wrong. Exhibit 44, which was part of the joint appendix before the Court of Appeals is printed as Appendix C hereto. This exhibit shows beyond doubt that petitioner did receive money in 1959.

counts on the unsubstantiated deduction theory by stating that "[the trial court's] comments served only to remind the jury of the evidence relating to payments by Palmer Import during its fiscal years that included a portion of Calendar 1959 * * *" and "* * * did not constitute a suggestion, contrary to the evidence that any payments in 1959 affected * * * [Counts 2 and 3]" (Appendix A, p. 6a).

Petitioner's contention that the prosecutor had made himself an unsworn witness during his summation by vouching for a witness' credibility was summarily dealt with by the Court below on the grounds that such remarks were not improper, and moreover, the failure of defense counsel to object waived the point (Appendix A, p. 7a).

Reasons for Granting the Writ

This Court has set down for argument a case in which a question identical to one presented by this petition will be decided.

On December 17, 1968, in the case of *Benton* v. *Maryland,* Docket No. 201, this Court ordered reargument on March 24, 1969, on the question, "Does the concurrent sentence doctrine, enunciated in *Hirabayashi* v. *United States,* 320 U. S. 81, 105, and subsequent cases, have continuing validity in light of such decisions as *Ginsberg* v. *New York,* 390 U. S. 629, 633 n. 2, *Peyton* v. *Rowe,* 391 U. S. 54, *Carafas* v. *La Vallee,* 391 U. S. 234, 237-238, and *Sibron* v. *New York,* 392 U. S. 40, 50-58?"

This question is identical to the first question raised by petitioner herein.

The concurrent sentence doctrine enunciated in *Hirabayashi* v. *United States* and subsequent cases has and will continue to deprive petitioner of his constitutional right to due process and is an unsound rule of appellate review which should be corrected.

In the instant case, the Court of Appeals refused to review petitioner's conviction on six out of eight counts of the indictment on the ground that his sentence on all the counts was concurrent. In addition to those reasons indicated by cases cited in this Court's order in *Benton* v. *Maryland* granting reargument on the question of concurrent sentences, we submit, that the Court of Appeals' refusal to grant petitioner appellate review of six counts on which he was convicted constitutes an especial deprivation of Due Process. Petitioner's potential civil tax liability for deficiencies as well as fraud penalties has not yet been determined. Yet in any civil proceeding instituted by the government to collect such sums, it is clear under settled case law that this petitioner's conviction on these six counts will collaterally estop him to deny liability and fraud for the years involved. *Tomlinson* v. *Lefkowitz,* 334 F.2d 262 (5th Cir. 1964), *cert. denied,* 379 U. S. 962 (1965) (criminal conviction collaterally estops taxpayer from getting refund of civil fraud penalties for same taxable years); *Armstrong* v. *United States,* 354 F.2d 274 (Ct. Claims 1965) (criminal conviction collaterally estops taxpayer on issue of fraud penalties despite Commissioner's determination that taxpayer's couduct was not fraudulent); *Moore* v. *United States,* 360 F.2d 353 (4th Cir. 1965), *cert. denied,* 385 U. S. 1001 (criminal conviction is conclusive on issue of fraud in collateral suit for taxes, with fraud penalties); *Amos* v.

Commissioner of Internal Revenue, 360 F.2d 358 (4th Cir. 1965) (criminal conviction collaterally estops taxpayer on the issue of fraud in subsequent civil proceedings). And see: *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951); *Local 167 I.B.T.* v. *United States*, 291 U. S. 293 (1934).

Additionally, if petitioner's conviction on six counts were reversed, he could argue that his invalid conviction on six counts tainted his conviction on the two similar counts which the Court of Appeals has sustained. Such a contention cannot be raised, however, so long as petitioner cannot get appellate review of his conviction on the six counts. *Cf. Bruton* v. *United States*, 391 U. S. 123 (1968); *Jackson* v. *Denno*, 378 U. S. 368 (1964); *Hartman* v. *United States*, 215 F.2d 386 (8th Cir. 1954); *United States* v. *Kelly*, 349 F.2d 720, 758 (2d Cir. 1965), *cert. denied*, 384 U. S. 947 (1966); *United States* v. *Long*, 257 F.2d 340, 342 (3d Cir. 1958); *United States* v. *Barash*, 365 F.2d 395, 399 (2d Cir. 1966).

Moreover, we submit, that if petitioner's conviction on these six counts was invalid he is entitled to be resentenced irrespective of the validity of his conviction on the remaining two counts. In the event of reversal of the six counts, this case is the same as those in which the sentencing judge determines a defendant's sentence in the belief that the defendant has in fact committed more crimes than those of which he has been convicted. In such circumstances, courts on appeal have required a resentencing. In *Townsend* v. *Burke*, 334 U. S. 736, 740 (1948), this Court said, "We are not at liberty to assume that items [false state-

ments by an officer as to defendant's criminal record] given such emphasis by the sentencing court, did not influence the sentence * * *." See also, *Smith* v. *United States,* 223 F. 2d 750 (5th Cir. 1955) (if presentence report contains false statements as to a defendant's record sentence is void as lacking in due process); *Baker* v. *State,* 3 Md. App. 251 (1968) (case remanded for resentencing where trial judge considered defendant also guilty of other crimes he was not convicted of).

Obviously, petitioner herein is deprived of the opportunity to raise this latter contention so long as he is denied appellate review of the six counts, which are unquestionably affected by the evidence he challenged as legally insufficient.

Moreover, even if petitioner were not entitled to be resentenced as of right, reversal of conviction on six counts would present a strong argument for a discretionary reduction of sentence under Rule 35, Federal Rules of Criminal Procedure.

We further submit that the concurrent sentence doctrine as applied herein deprived petitioner of the equal protection of the laws in that his right of appellate review under 28 U.S.C. §1291 of the decisions of the District Court that he was guilty of eight separate crimes was unreasonably denied him, whereas had be not been sentenced in this manner his right to review would have been left intact.

The Court of Appeals' determination that the jury's verdict on Counts 2 and 3 was not affected by evidence challenged by petitioner as insufficient violates this Court's holdings in *Stromberg* v. *United States* and *Yates* v. *United States*.

The Court of Appeals decided that the jury's verdict on Counts 2 and 3 was not based on the evidence of unsubstantiated business deductions. In *Stromberg* v. *California*, 283 U. S. 359 (1931), and succeeding cases, this Court laid down as a fundamental rule of appellate review of criminal convictions that if the jury might have convicted the defendant on an impermissible theory, such conviction must be reversed, even though a valid alternative ground existed upon which the conviction could have been sustained. What this obviously means is that where a jury may have based its verdict on a legally deficient theory, even though it did not necessarily or could not properly have so based it, the defendant is entitled to a reversal.

This rule must be applied in light of this Court's rulings in *Yates* v. *United States*, 354 U. S. 298 (1957) and *Bollenbach* v. *United States*, 326 U. S. 607 (1946). In *Yates* v. *United States*, 354 U. S. 298, this Court held that a conviction had to be reversed when a verdict was supportable on one ground but not on another, and when the judge's charge was not so clear as to warrant a finding that the jury must have understood it could only consider the supportable ground.

A jury is not so sophisticated as a Court of Appeals. A confusing and contradictory charge may not convey to a jury the necessity of its adopting the more complex of two

theories even though the Court of Appeals later determines, after cool deliberation, that the charge should properly be read that way. This is particularly true when the Court of Appeals mistakenly assumes there was no evidence to support an alternative reading of the charge, when, in fact, there was such evidence before the jury. *Compare, Bruton* v. *United States,* 391 U. S. 123 (1968); *Jackson* v. *Denno,* 378 U. S. 368 (1964).

In the instant case, as the Court of Appeals recognized, the trial court instructed the jury that the government had presented evidence relating to improper business deductions for the years 1959 to 1964. Instead of regarding it as possible that the jury may have considered these instructions as permitting it to base a verdict of guilt on the 1959 counts on these same improper business deductions, the Court of Appeals interpreted the instructions as conveying to the jury a much more difficult and involuted thought, namely, that such deductions, if any, represented additional fiscal 1960 income to Palmer and therefore additional calendar 1960 income to Proner when his proportionate share of undistributed profits was calculated.

Buttressing its conclusion that counts 2 and 3 were unaffected by the unsubstantiated business expense deduction theory, was its belief that there was no evidence in the case that petitioner had received any money in 1959. In this belief the Court was wrong. See Exhibit 44, Appendix C hereto.

What we have here, then, is a case where a man is charged with tax evasion and false statements for 1959, where the government proves the man received reimburse-

ments in 1959 in accord with its theory that he is guilty for failing to report as income to him reimbursements he received, and where the trial court's charge explains to the jury what the government's theory is and reminds it that there were such reimbursements in 1959. We submit the Court of Appeals applied too loose a standard and that, in fact, the jury's verdict on the 1959 counts may have been influenced by the evidence and charge on the insufficiently substantiated deduction theory advanced by the government.

It is particularly unsuitable for a court on appeal to indulge in nice calculations in retrospect as in the case at bar where one of the prosecution's theories is highly complex and difficult to understand, and the other sedulous, easy and highly prejudicial. *Compare Hartman* v. *United States,* 215 F.2d 386 (8th Cir. 1954); *United States* v. *Kelly,* 349 F.2d 720, 758 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966); *United States* v. *Long,* 257 F.2d 340, 342 (3d Cir. 1958); *United States* v. *Barash,* 365 F.2d 395, 399 (2d Cir. 1966).

Petitioner was deprived of his right to confrontation by the prosecutor's vouching for the credibility of his chief witness in his summation.

The prosecutor vouched for the credibility of his chief witness by stating that the witness had made statements to him antedating the trial which were consistent with the witness' challenged testimony (Record, p. 780). Since the defendant was not able to cross-examine the prosecutor, he was deprived of his constitutional right to confrontation. *See Berger* v. *United States,* 295 U. S. 78 (1934); *Compare, Pointer* v. *Texas,* 380 U. S. 400 (1965).

Conclusion

For the reasons stated herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRIS B. STEINBERG
Attorney for Petitioner

HARRIS B. STEINBERG
STANLEY S. ARKIN
Of Counsel

February, 1969

Appendix A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 236—September Term, 1968.

(Argued December 12, 1968 Decided January 10, 1969.)

Docket No. 32573

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM PRONER,

Appellant.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Walter R. Mansfield, *Judge,* convicting appellant after a jury trial of attempting to evade payment of income tax, filing false statements in connection with his income tax, and conspiring to commit these acts, all in violation of 26 U.S.C. §§7201 and 7206 (1964) and 18 U. S. C. §371 (1964).

Appendix A

Affirmed.

HARRIS B. STEINBERG, New York, New York (Stanley S. Arkin, on the brief), *for Appellant.*

PETER ZIMROTH, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, David M. Dorsen and Charles P. Sifton, Assistant United States Attorneys, on the brief), *for Appellee.*

HAYS, *Circuit Judge*:

William Proner appeals from a judgment of the United States District Court for the Southern District of New York, Walter R. Mansfield, *Judge,* convicting him, after a jury trial, on eight counts of attempting to evade payment of income tax, filing false statements in connection with his income tax and conspiring to commit these acts, all in violation of 26 U. S. C. §§7201 and 7206 (1964) and 18 U. S. C. §371 (1964).

Under a compromise agreement with the Internal Revenue Service made by Proner in 1957, Proner was to pay a portion of his "annual income" for the years 1956-1965 on account of his tax liability for the years 1942-1945. The term "annual income" was defined to include wages and, if Proner became a stockholder in a closely held corporation, "his proportionate share of corporate net income in excess of $5,000.00 as determined for Federal income tax purposes, * * * whether distributed or undistributed to him."[1]

1. The definition of corporate net income was subject to further qualifications not relevant here.

Appendix A

The indictment charged that Proner (1) wilfully attempted to evade his 1959 income tax in violation of 26 U. S. C. §7201 (1964) (count 2); (2) wilfully filed false statements of annual income for the years 1959-1964 in violation of 26 U. S. C. §7206 (1964) (counts 3-8); and (3) conspired to commit the offenses charged in counts 2-8 and to defraud the United States of payments due under the terms of the compromise agreement with the Internal Revenue Service in violation of 26 U. S. C. §371 (1964) (count 1).

The government sought to prove at trial (1) that Proner held an interest in the "Palmer Division" of the S & E Novelty Company and, later, in the Palmer Import Trading Company during the years 1956-1964; (2) that he wilfully filed a false income tax return in 1959 and false Statements of Annual Income for the years 1959-1964 by failing to report his share of the profits of these companies;[2] (3) that he wilfully filed false Statements of Annual Income for the years 1960-1964 by failing to report additional income received by him from Palmer Import in the form of expense allowances; (4) that, by improperly deducting as business expenses during 1960-1964 these expense allowance payments to Proner, Palmer Import understated its income and Proner wilfully filed false Statements of Annual Income for 1960-1964 by failing to report his proportionate share of the understated amount; and (5) that Proner con-

2. In 1957 and 1958 Proner also held an interest in Kaplan Brothers, a company controlled by the S & E Novelty Company. Kaplan Brothers lost money during this period. These losses must be subtracted from the profits of Palmer Division to compute the amount Proner should have reported.

spired with others to commit these acts. The jury found Proner guilty on all eight counts of the indictment. He was sentenced to a three year term on each count with the terms to run concurrently.

On this appeal Proner challenges the sufficiency of the evidence regarding his failure to report income attributable to Palmer Import's payments to him for his alleged business expenses. This evidence provides the sole basis for the conviction on count 7 because the government offered no evidence that Proner failed to report other income in 1963, the year covered by count 7. Proner also claims that under the charge given by the court the jury might have convicted him on counts 2, 3, 4, 5, 6 and 8 solely on the basis of the evidence as to business expenses. He argues that the evidence, relating as it does only to the failure to substantiate business expenses, does not show a wilful failure to report income in violation of 26 U. S. C. §§7201 and 7206 (1964). If he is correct, the conviction on counts 2-8 is subject to reversal since there is no way for this court to know on which evidence the jury based its verdict. Moreover a successful challenge to counts 2-8 would require reversal of the conspiracy conviction under count 1 because this court cannot know whether the conviction under that count was based on the evidence relating to the payments for expenses. Thus Proner argues that we must reverse the judgment of conviction on all counts and grant him a new trial.

For the reasons set forth below we need not decide the merits of the arguments Proner advances.

No evidence involving unsubstantiated business expenses was presented with respect to Proner's 1959 income tax

return (the subject of count 2) and his 1959 Statement of Annual Income (the subject of count 3). The evidence adduced in support of count 2 concerned the distribution to Proner of the profits of the Palmer Division when it was liquidated in 1959 and a claimed capital loss carry-over deduction of $1000 arising from the overstatement of Proner's loss in 1956 on the sale of his interest in the company the business of which was transferred to the "Palmer Division" of S & E Novelty Company. The evidence in support of count 3 relates only to Proner's failure to include in his Statement of Annual Income for 1959 his profit distribution from the Palmer Division and his proportionate share of Palmer Import's net income.

It is true that Proner may have received amounts in 1959 for business expenses that he did not report as income in his 1959 income tax return or in his 1959 Statement of Annual Income. This possibility arises from the fact that Palmer Import operated on a fiscal year running from October through September so that its 1960 return included operations during the last quarter of calendar year 1959. No evidence was offered as to whether some of the payments to Proner disallowed as deductions to Palmer Import in its 1960 fiscal year actually took place during calendar year 1959. Proner's tax year was the calendar year and the payments to Proner disallowed as deductions to Palmer Import for its 1960 fiscal year were introduced in evidence only with respect to Proner's 1960 income tax return and 1960 Statement of Annual Income. This point was made clear in the testimony of one of the government's witnesses and in the opening remarks by

the prosecutor. Although Judge Mansfield referred in his charge to "payments by Palmer to Proner during the period from 1959 to 1964, which were improperly deducted," and noted that "[a]s for the years 1959 to 1961 there was testimony * * * that the amounts disallowed had been agreed to by Palmer and had been added to Proner's income with Proner's agreement," his comments served only to remind the jury of the evidence relating to payments by Palmer Import during its fiscal years that included a portion of calendar 1959. Thus the comments did not constitute a suggestion, contrary to the evidence, that any payments in 1959 affected Proner's 1959 income tax return and Statement of Annual Income. Since, therefore, the government presented no evidence involving payments to Proner for unsubstantiated expenses with respect to counts 2 and 3 and the judge's charge cannot properly be read as suggesting that such evidence was presented, the jury's verdict on these counts must stand.

Because the conviction on counts 2 and 3 is unrelated to the evidence challenged by Proner and because the sentences on all counts were concurrent, the judgment of conviction must be affirmed regardless of the validity of the conviction on the other counts. *Lawn* v. *United States*, 355 U. S. 339, 359 (1958);[3] *United States* v. *Marino*, 396 F. 2d 780, 781 (2d Cir. 1968).

During his summation defense counsel indicated that the prosecutor had remained silent even though he knew

3. We note that on December 16, 1968 the Supreme Court denied certiorari in *Cribb* v. *United States*, 397 F. 2d 361 (5th Cir. 1968), which involves an application of the *Lawn* doctrine. 37 U. S. L. W. 3216 (U. S.) (December 17, 1968).

his witness, Schur, was lying on the stand. The prosecutor replied to this comment in his summation by saying: "I can't take the stand and testify. But I am telling you right now that if I did not believe what [Schur] had told me was true, I would never have let it stay the way it was on the record." This reply defending the prosecutor's integrity and, by implication, vouching for Schur's credibility does not require reversal. See *United States* v. *Stromberg*, 268 F. 2d 256, 270-71 (2d Cir.), cert. denied, 361 U. S. 863 (1959). Moreover the point was waived since no objection to the prosecutor's remarks was raised at trial. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238-40 (1940); *United States* v. *Dibrizzi*, 393 F. 2d 642, 645-46 (2d Cir. 1968).

Affirmed.

Appendix B

Judgment of the Court of Appeals Entered January 10, 1969

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of January one thousand nine hundred and sixty-nine.

Present:

Hon. LEONARD P. MOORE,
Hon. J. JOSEPH SMITH,
Hon. PAUL R. HAYS, *Circuit Judges.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LEO KAPLAN,
Defendant,

WILLIAM PRONER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

FILED
January 10, 1969
United States
Court of Appeals
Second Circuit
32573

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING

DATE	AMOUNT

TOTAL OF INVOICES
LESS ___% DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

PALMER IMPORT TRADING CO., INC.
57 WEST 58TH STREET

1-33
210

539

NEW YORK, 12/24 1954 No. 1072

PAY TO THE ORDER OF Cash $1020.10

[illegible] DOLLARS 10 CTS

DOLLARS

[illegible] PALMER IMPORT TRADING CO., INC.

[illegible] PALMER IMPORT TRADING CO.
[illegible] AT 58TH STREET
NEW YORK

AUTHORIZED SIGNATURE

COVERNMENT'S
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
NOV 15 1957

[illegible]

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335-386—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1022

WILLIAM PRONER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. 1a–7a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. 9a–10a) was entered on January 10, 1969, and the petition for a writ of certiorari was filed on February 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conviction on Counts 2 and 3 (relating to 1959) may have been based upon challenged evidence relating to disallowed business deductions.

2. Whether the prosecutor committed reversible error in his summation by vouching for the credibility of a government witness, after the defense had alleged in its summation that the prosecutor knew the witness was lying on the witness stand.

3. Whether the concurrent sentence doctrine enunciated in *Hirabayashi* v. *United States,* 320 U.S. 81, 105, and subsequent cases, applied by the court below in the instant case, is an unconstitutional deprivation of due process or constitutes an unsound rule of appellate review.

STATEMENT

1. In April, 1966, petitioner and his brother-in-law, one Kaplan, were indicted in eight counts for (1) wilfully attempting to evade petitioner's 1959 income tax in violation of 26 U.S.C. 7201 (count 2); (2) wilfully filing false statements of annual income on behalf of petitioner for the years 1959 through 1964 in violation of 26 U.S.C. 7206(1) (counts 3–8); and (3) conspiring to commit the offenses charged in the other seven counts and to defraud the United States of payments due under the terms of a compromise agreement with the Internal Revenue Service, in violation of 18 U.S.C. 371 (count 1). After a jury trial in the United States District Court for the Southern District of New York, the defendants were found guilty on all counts; petitioner was sentenced to concurrent three-year prison terms on each of the eight counts (R. 896–897).[1] On

[1] The designation "R." refers to the five-volume transcript of proceedings at the trial, on file with this Court.

appeal, the court of appeals reviewed and affirmed the convictions on counts 2 and 3 of the indictment, both relating to the year 1959. It then held that "[b]ecause the conviction on counts 2 and 3 is unrelated to the evidence challenged by Proner and because the sentences on all counts were concurrent, the judgment of conviction must be affirmed regardless of the validity of the conviction on the other counts" (Pet. App. 6a).

2. During the years 1942 through 1945 petitioner accumulated an unpaid income tax liability of over one million dollars, which was still outstanding in 1955 when petitioner began to negotiate a compromise agreement with the Internal Revenue Service. In November, 1957, a compromise was agreed upon by the Service, under which petitioner was obliged to pay to the Service $17,500 in cash and a percentage of his annual income during the years 1956 through 1965 (R. 37–43). The agreement also provided that, in the event petitioner became a stockholder in a closely held corporation, his "annual income" was to include "his proportionate share of corporate net income in excess of $5,000 * * * plus all nontaxable income and minus federal income tax due for the year in question and paid" as well as petitioner's proportionate share of corporate profits not distributed to him. Petitioner was obliged to file a sworn Statement of Annual Income, as defined in the agreement, yearly (R. 44–45).

At the time petitioner negotiated the compromise agreement with the Service he owned a 40 percent interest in a corporation known as Palmer Import Trading Co., the "old Palmer." He had invested

$25,000 in the company when it was organized in 1955, as had co-conspirator Aaron Schur. Schur owned 40 percent of the old Palmer through his wholly owned S & E Novelty Co. (R. 60–62). In May, 1956, Schur and petitioner liquidated the old Palmer and made it a division of S & E Novelty Co., the "Palmer Division" (R. 64–66). Petitioner received about $22,000 as a return on his investment of $25,000 (R. 69–71, 346–350). Nonetheless, he was to continue to run the business and, pursuant to a secret oral agreement, was to receive 40 percent of the profits of Palmer Division plus an amount (which was about the amount of income exempt from taxation under the compromise agreement) of $150 a week for salary (R. 67, 90). At petitioner's request the agreement was not reduced to writing. Schur testified that petitioner had told him the reason for his request was the "many * * * troubles that [petitioner] has or expected to have" concerning his taxes (R. 68–69).

The Palmer Division operated successfully from May, 1956, to February, 1959, although no distributions of profit were made to petitioner (R. 94–95, 98, 351–357). The Palmer Division was then liquidated in March, 1959, and Schur and petitioner agreed that petitioner would receive his accumulated profits in the form of inventory and some cash, so that he could continue the business. In the ensuing transactions petitioner paid only $124,236.78 for inventory which had cost the Palmer Division $166,713.27; what petitioner did not select was retained by S & E Novelty. In addition, petitioner received $25,000 in the form of two checks, one for $9,707.10 ($12,000 less taxes)

made to petitioner's order and one for $10,527.10 ($13,000 less taxes) made to the order of Kaplan, the Palmer Division's bookkeeper and petitioner's brother-in-law.[2] With this inventory and cash, petitioner set up a new Palmer Import and Trading Co., the "new Palmer" (R. 95–96, 134–139, 153–162, 403–404, 408–409). Petitioner paid for the inventory by a promissory note of the new Palmer in the amount of $110,000 and a $14,236.78 trade acceptance (R. 163–171). Although nominal ownership of the new Palmer was in Kaplan, in fact Kaplan remained a bookkeeper and petitioner ran the business (R. 138–139, 371, 406, 424). In August, 1959, half of the new Palmer's stock was purchased by a third party (R. 376–377, 405–407).

The government's proof of tax evasion for 1959 (count 2) was based on petitioner's failure to report the Palmer Division's profits, distributed to him in 1959 in the form of inventory and the two checks (R. 479–585). The charge of wilfully filing a false Statement of Annual Income for 1959 (count 3) was based upon petitioner's failure to include in the Statement his share of the 1959 profits of the Palmer Division. No proof of unsubstantiated business expenses of the new Palmer was introduced on these counts.

ARGUMENT

1. In declining to review counts 1 and 4 through 8, the court of appeals found it unnecessary to pass on an allegation that the government had failed to prove

[2] This check was supposedly for Kaplan's future services to S & E Novelty as assistant general manager. Schur testified that Kaplan was not hired as assistant general manager.

that petitioner had not spent for business purposes money he had received from the new Palmer allegedly for business expenses, but deduction of which was disallowed to new Palmer for lack of substantiation, and that such proof was necessary to a guilty finding. Petitioner had argued that this defect infected all counts on which he was convicted. The court found, however, "[n]o evidence involving unsubstantiated business expenses was presented with respect to Proner's 1959 income tax return (the subject of count 2) and his 1959 Statement of Annual Income (the subject of count 3)" (Pet. App. 4a–5a), and that "the judge's charge cannot properly be read as suggesting that such evidence was presented" (Pet. App. 6a). In arguing that the jury's verdict on counts 2 and 3 may have been based upon the evidence of the disallowed business deductions, petitioner now seeks to relitigate that issue here.

To the extent petitioner challenges the direct findings of the court of appeals on a factual issue fully briefed and argued below, his petition plainly does not warrant further review. The court of appeals' conclusion was correct.

Petitioner relies upon Govt. Exh. 44 (Pet. 11a)—a $1,000 check dated December 24, 1959, payable to cash, drawn on the account of the new Palmer, and endorsed by petitioner—for the theory that the jury may have convicted him on the challenged evidence. But the government's summary for 1959 did not include this item (R. 572–574, 578–579, 582–585); the only relevant testimony was that it was chargeable to petitioner in

the year 1960 (R. 466–468).[3] In both his opening statement and his summation (R. 29, 796–797) the prosecutor referred to the disallowed business expense deductions, including this check, as relating to 1960 and thereafter. And in instructing the jury on the theory on which they could convict on count 2, the trial judge made it clear to them that the only unreported income which the government claimed for 1959 was that attributable to the check to Kaplan and the inventory price differential (R. 850):

> In the event that you should conclude that no part of the $13,000 or of the difference in value or price of the inventory, which the Government claims was about $42,000, should have been included by Proner in his adjusted gross income for the year 1959, then you would find the defendants not guilty of the charges against them in Count 2 of the indictment.

Thus, unless the jury ignored the evidence, counsel's arguments, and the court's instructions, it could not have convicted petitioner of tax offenses relating to 1959 in reliance on the challenged evidence.

2. Nor is there merit in the contention (Pet. 16) that the prosecutor erred in vouching for the credibility of a government witness. No objection was made at the trial and, as the court below found (Pet. 6a–7a),

[3] The new Palmer operated on a fiscal year running from October through September, and therefore its fiscal year included three months of the previous calendar year. It is clear, however, that all of the corporation's disallowed business deductions for its fiscal year ending in 1960 were treated as income to petitioner for the calendar year 1960, and none were treated as income to him for 1959. Both petitioner and the new Palmer agreed that such disallowed items would be so treated (R. 468–469).

the defense opened the door to the remark by claiming in the course of its summation that the prosecutor had remained silent even though he knew the witness was lying on the stand. See *Lawn* v. *United States*, 355 U.S. 339, 359–360, n. 15.

3. There remains the question whether the court's conclusion that the challenged evidence did not affect the convictions on counts 2 and 3 was a sufficient basis for its application of the concurrent sentence doctrine. The question whether that doctrine has continuing validity is now before this Court in *Benton* v. *Maryland*, No. 201, this Term, and it would be appropriate to defer action on this petition until decision in that case. The United States is participating as *amicus curiae* in *Benton* by invitation of the Court; we respectfully refer the Court to the views we have set forth at length in our Brief in that case.

As we there elaborate, it is our view that an appellate court may deny review to issues affecting less than all counts on which concurrent sentences have been imposed after a single trial if convictions on other counts are affirmed, *unless* it is shown that the unreviewed counts will impose independent legal consequences on the accused. The court of appeals has found that the disallowed business deduction issue reaches less than all counts on which petitioner was convicted and sentenced, and has affirmed the unaffected counts. Thus, the only question remaining is whether in fact there were collateral legal consequencs.

Petitioner alleges (Pet. 11–12) that he will be estopped in civil proceedings to deny both his tax

liability and the existence of fraud with respect to 1960–1964, the years covered by the unreviewed counts. We agree that any such estoppel would constitute a collateral legal consequence entitling an accused to full review. However, there would be no estoppel as to fraud here; unlike the amounts owed in the cases petitioner cites, the amounts he owes for 1960–1964 do not constitute a tax on which a 50% civil fraud penalty could be levied under I.R.C. 6653(b)—they are sums due under the compromise settlement. Nor is there an estoppel as to the principal amount due under that offer. "Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action." A.L.I. Restatement, *Judgments,* Sec. 69(2); *Allegheny County* v. *Maryland Casualty Co.,* 146 F.2d 633, 637 (C.A. 3), certiorari denied, 325 U.S. 855; *Worcester* v. *Commissioner,* 370 F. 2d 713, 718–719 (C.A. 1); cf. *International Refugee Organization* v. *Republic S.S. Corp.,* 189 F.2d 858, 862 (C.A. 4). In short, since the court below did not pass upon these counts, the judgment is not final for purposes of collateral estoppel; and if a judgment of conviction is not final so far as the rules of collateral estoppel are concerned, it is not final for purposes of admissibility into evidence in a subsequent cause of action. Cf. *Fifth and Walnut* v. *Loew's Incorporated,* 176 F.2d 587, 592–593 (C.A. 2), certiorari denied, 338 U.S. 894; *International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.,* 315 F.2d 449, 454 (C.A. 1), certiorari denied, 375 U.S. 820.

We conclude that there is no need for the court of appeals to review Counts 4 through 8 since the failure to review them carries with it no collateral consequences which may prejudice petitioner.[4]

4. Finally, we note that once the court below had found that counts 2 and 3 would be unaffected by any error as to the remaining counts, it concluded that it "must" affirm the judgment of conviction regardless of any such error (Pet. App. 6a). As we indicate in our *Benton* brief, we do not believe the concurrent sentence doctrine to be mandatory upon reviewing courts; it is, rather, a doctrine of judicial convenience and sound administration which need not be invoked when reason to review all counts appears. Since the Second Circuit itself has stressed this discretionary aspect of the doctrine (*e.g., United States* v. *Hines,* 256 F.2d 561, 562–563), it may be doubted whether the present opinion is properly to be read as indicating that the court viewed itself as jurisdictionally or otherwise *disabled* from reaching the other counts. Nor is there any basis for supposing that the court would have acted differently as a matter of discretion. Nevertheless, if *Benton* is decided consistently with our submission in that case, it might be appropriate to vacate the judgment in this case and

[4] We do not believe it follows, as petitioner urges, that if he obtains a partial reversal he is *entitled* to be resentenced on the affirmed counts. Such relief lies within the discretion of the appellate court, but would be appropriate only if that court believed the reversals undercut the trial court's sentencing decision. That is unlikely to be its view here, since the 1959 transactions constituted the most egregious of the violations of tax law and petitioner's understanding with the Internal Revenue Service.

remand the case to the court of appeals for reconsideration in light of this Court's opinion.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

MARCH, 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

PRONER *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 1022. Decided June 23, 1969.

Certiorari granted; 405 F. 2d 943, vacated and remanded.

Harris B. Steinberg for petitioner.

Solicitor General Griswold, Assistant Attorney General Walters, and *Joseph M. Howard* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Benton* v. *Maryland, ante,* p. 784.